

1 W. WEST ALLEN  
2 Nevada Bar No. 5566  
3 wallen@lrlaw.com  
4 LEWIS ROCA ROTHGERBER LLP  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89109  
Telephone: (702) 949-8200  
Facsimile: (702) 949-8398

6 WILLIAM F. LEE (*pro hac vice admission pending*)  
william.lee@wilmerhale.com  
7 DOMINIC E. MASSA (*pro hac vice admission pending*)  
dominic.massa@wilmerhale.com  
8 WILMER CUTLER PICKERING  
HALE AND DORR LLP  
9 60 State Street  
Boston, MA 02109  
10 Telephone: (617) 526-6000  
Facsimile: (617) 526-5000

11 JAMES M. DOWD (*pro hac vice admission pending*)  
james.dowd@wilmerhale.com  
12 WILMER CUTLER PICKERING  
HALE AND DORR LLP  
13 350 South Grand Avenue, Suite 2100  
Los Angeles, California 90071  
14 Telephone: (213) 443-5300  
Facsimile: (213) 443-5400

16 *Attorneys for Defendants*  
Nintendo Co., Ltd., and Nintendo of America Inc.

**UNITED STATES DISTRICT COURT**

## DISTRICT OF NEVADA

20 | NXP B.V..

CASE NO. 2:13-cv-00453-MMD-VCF

21 Plaintiff.

**DEFENDANTS' MOTION TO STAY  
DISCOVERY PROCEEDINGS PENDING  
DETERMINATION ON DISPOSITIVE  
MOTION**

23 NINTENDO CO., LTD., and  
24 NINTENDO OF AMERICA INC.

## Defendants

1           Defendants Nintendo Co., Ltd. (“NCL”) and Nintendo of America Inc. (“NOA”)  
 2 (collectively, “Nintendo”) respectfully move the Court for an order staying the discovery  
 3 proceedings in the above-captioned litigation until the Court rules on Nintendo’s pending Motion  
 4 to Dismiss NXP’s First Amended Complaint or, in the Alternative, Transfer to the Northern  
 5 District of California (Dkt. No. 34) (“motion to dismiss”).

6 **I. FACTUAL BACKGROUND**

7           On March 18, 2013, Plaintiff NXP B.V. (“NXP”) initiated this litigation by filing its  
 8 Complaint for Patent Infringement (Dkt. No. 1) (“Original Complaint”). On May 23, 2013, NXP  
 9 filed its First Amended Complaint for Patent Infringement (Dkt. No. 28) (“Amended Complaint”).  
 10 NXP’s Amended Complaint alleges that Nintendo directly and indirectly infringes five asserted  
 11 patents: United States Patent Nos. 6,563,882; 7,570,716; 8,203,432; 8,150,316; and 8,249,503.

12           On August 13, 2013, and pursuant to stipulation and order (*see* Dkt. No. 33), Nintendo  
 13 responded by filing its motion to dismiss.<sup>1</sup> The motion presents a case-dispositive issue for which  
 14 no additional discovery is necessary, *i.e.* whether the Court has personal jurisdiction over either  
 15 NCL or NOA. Specifically, Nintendo’s motion to dismiss demonstrates that Nevada lacks general  
 16 or specific jurisdiction over either NCL or NOA.<sup>2</sup> As set forth in detail in the motion, neither  
 17 NCL nor NOA is domiciled in Nevada, and neither has any continuous or systematic contacts with  
 18 Nevada that would support the exercise of general jurisdiction here. Dkt. No. 34 at 8:18-9:6.  
 19 Furthermore, Nevada cannot exercise specific jurisdiction over NCL or NOA because: (1) NXP  
 20 fails to plead any facts demonstrating that either company committed any acts of patent  
 21 infringement in Nevada; (2) NXP fails to plead any facts demonstrating that either company  
 22 purposefully directed any allegedly infringing products or activities at residents of Nevada; and (3)  
 23 exercising personal jurisdiction over NCL or NOA in Nevada would offend traditional notions of  
 24 fair play and substantial justice. *Id.* at 9:7-15:8.

25  
 26 <sup>1</sup> Nintendo also simultaneously filed a Motion to Dismiss First Amended Complaint for Failure to State a Claim (Dkt. No. 35).

27 <sup>2</sup> As described more fully in the motion to dismiss, the relevant facts differ somewhat with respect to NCL and NOA,  
 28 but the ultimate conclusions based on those facts are the same: neither Nintendo entity is subject to personal  
 jurisdiction in Nevada.

1       On August 26, 2013, Nintendo and NXP reached a verbal agreement to stay all discovery  
 2 until the motion to dismiss was resolved, in exchange for permitting NXP an additional 30 days to  
 3 respond to the motion. Declaration of James M. Dowd (“Dowd Decl.”) at ¶¶ 2-3. Based upon this  
 4 verbal agreement, Nintendo prepared a draft stipulation that it provided to NXP for review later  
 5 that same day. *Id.* at ¶ 3 and Ex. 1. However, on August 27, 2013, NXP reneged on the parties’  
 6 agreement, acknowledging that NXP was doing a “complete 180” from its position the prior day.  
 7 *Id.* at ¶ 4. On August 29, the parties again reached agreement to stay the Rule 26(f) process in  
 8 exchange for a 30-day extension of NXP’s opposition. *Id.* at ¶ 5. But that evening, and without  
 9 prior warning to Nintendo, NXP unilaterally moved for an extension and for jurisdictional  
 10 discovery in derogation of the parties’ agreement. *Id.* at ¶ 6. Never once in this process did NXP  
 11 identify any specific discovery that it contended it needed from either NCL or NOA. *Id.* at ¶ 7.

12       Nintendo brings this motion to avoid the prejudice of being subjected to discovery in a  
 13 forum with which it has no “minimum contacts” and to obtain the stay to which NXP originally  
 14 agreed.

## 15       **II.      LEGAL STANDARD**

16       Discovery is commonly stayed pending the outcome of a potentially dispositive motion to  
 17 dismiss, including motions to dismiss for lack of personal jurisdiction. *Stellia Ltd. v. BS Card*  
*Serv. GmbH*, 2:12-CV-01099-GMN, 2013 WL 1195709, \*3 (D. Nev. Mar. 22, 2013); *see also*  
*Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (“The purpose of  
 20 F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints  
 21 without subjecting themselves to discovery.”); *Ministerio Roca Solida v. U.S. Dep’t of Fish &*  
*Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013); *Tradebay v. eBay*, 278 F.R.D. 597, 601 (D. Nev.  
 23 2011). Courts apply a two-part test to determine whether a stay is appropriate: the pending  
 24 motion must be (1) potentially dispositive of the entire case or at least dispositive of the issue on  
 25 which discovery is sought; and (2) capable of being decided without additional discovery. *Rizzolo*  
*v. Henry*, Case No. 2:12-cv-02043-APG-VCF, 2013 WL 1890665 at \*4 (D. Nev. May 3, 2013)  
 26 (citing *Mlenjnecky v. Olympus Imaging America, Inc.*, Case No. 2:10-cv-02630-JAM-KJN, 2011  
 27

1 WL 489743 at \*6 (E.D. Cal. Feb. 7, 2011)). “In applying this two-factor test, the court deciding  
 2 the motion to stay must take a ‘preliminary peek’ at the merits of the pending dispositive motion  
 3 to assess whether a stay is warranted. If the party moving to stay satisfies both prongs, a  
 4 protective order may issue” staying discovery. *Id.* (internal citations omitted).

5 **III. ARGUMENT**

6 **A. Nintendo’s Pending Motion To Dismiss Is Dispositive Of The Entire Case.**

7 Nintendo’s pending motion to dismiss indisputably meets the first part of the test. It  
 8 demonstrates that Nevada lacks jurisdiction over either NCL or NOA. If granted (as Nintendo  
 9 believes it must be), the motion is dispositive of the entire case. Courts regularly stay discovery  
 10 under the circumstances Nintendo’s motion presents. *See, e.g., Stellia*, 2013 WL 1195709 at \*3,  
 11 \*6 (staying all discovery pending determination on motion to dismiss for lack of personal  
 12 jurisdiction); *Liberty Media Holdings, LLC v. Letyagin*, 2:12-CV-00923-LRH, 2012 WL 3135671,  
 13 \*5-\*6 (D. Nev. Aug. 1, 2012) (staying discovery pending determination on motion to dismiss for  
 14 lack of personal jurisdiction, and permitting only limited discovery related to identities of other  
 15 defendants).

16 A “preliminary peek” at Nintendo’s motion to dismiss shows that it should be granted on  
 17 the merits. *Rizzolo*, 2013 WL 1890665 at \*4. As the motion demonstrates, NXP’s Amended  
 18 Complaint fails to plead general jurisdiction. Dkt. No. 34 at 8:18-9:6. This basis for jurisdiction  
 19 is thus foreclosed.

20 NXP’s Amended Complaint also fails as a matter of law to meet any part of the Federal  
 21 Circuit’s three-part test for specific jurisdiction. *Nuance Communc’ns, Inc. v. Abbyy Software*  
 22 *House*, 626 F.3d 1222, 1231 (Fed. Cir. 2010) (“(1) whether the defendant purposefully directed  
 23 activities at residents of the forum; (2) whether the claim arises out of or relates to those activities;  
 24 and (3) whether assertion of personal jurisdiction is reasonable and fair.”). (Dkt No. 34 at 9:7-  
 25 15:8.) To avoid repetition of each of the three factors in this brief, Nintendo incorporates that  
 26 portion of its motion to dismiss by reference here. (*See id.*) Nintendo will focus here on NXP’s  
 27 failure to plead facts that could have resulted in any act of infringement in the State of Nevada.

1 (See *id.* at 10:3-11:18.)

2 Specifically, NXP's Amended Complaint alleges "upon information and belief" that  
 3 "Nintendo" presented a prototype of the accused Wii U product at the International Consumer  
 4 Electronics Show ("CES") held in Las Vegas in January 2012. (Dkt. No. 28 at ¶ 4.) A key failure  
 5 of NXP's Amended Complaint, however, is that it fails to allege that this Wii U prototype was  
 6 capable of practicing the NFC technology that is the subject of NXP's asserted patent claims. (*Id.*;  
 7 *see also* Nintendo's Motion to Dismiss, Dkt. No. 34 at 10:11-23.) NXP could not (and cannot)  
 8 make that allegation because this prototype contained ***no NFC module*** at all. (Dkt. No. 34 at  
 9 10:18-19; Dkt. No. 34-3 at ¶ 9). NXP's allegations about CES 2012 are thus incapable of  
 10 conferring jurisdiction over this patent dispute. *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d  
 11 1358, 1360-61 (Fed. Cir. 2012); *Grober v. Mako Products, Inc.*, 686 F.3d 1335, 1347 (Fed. Cir.  
 12 2012) (rejecting jurisdiction where plaintiff "could not establish that [defendant] Oppenheimer has  
 13 operated or rented the [accused] MakoHead [product] in California").

14 Similarly, NXP's Amended Complaint alleges "upon information and belief" that  
 15 consumers could "test" the accused Wii U product at "kiosks" set up at certain unidentified "retail  
 16 locations" in Las Vegas. (Dkt. No. 28 at ¶ 6.) Once again, however, NXP fails to allege that any  
 17 Las Vegas retailer's Wii U kiosk was capable of NFC. (*Id.*; *see also* Nintendo's Motion to  
 18 Dismiss, Dkt. No. 34 at 11:1-9.) None could have been, because the Wii Us available in the  
 19 United States lacked firmware required for NFC functionality at the time of the Amended  
 20 Complaint. NXP's retailer kiosk allegations are thus incapable of conferring jurisdiction. *AFTG-*  
*TG*, 689 F.3d at 1360-61; *Grober* 686 F.3d at 1347. Moreover, because NXP also fails to allege  
 21 that either NCL or NOA set up such kiosks (and neither did), these supposed "contacts" cannot be  
 22 attributed to either defendant. (Dkt. No. 34 at 11:1-9.) *Hanson v. Denckla*, 375 U.S. 235, 253  
 23 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant  
 24 cannot satisfy the requirement of contact with the forum State.").<sup>3</sup>

25 In short, NXP's Amended Complaint fails to plead a connection among NCL and NOA,

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26  
 27  
 28 <sup>3</sup> The Amended Complaint's allegation that unidentified third-party "accessory vendors" displayed a Wii U at CES  
 2013 (*see* Dkt. No. 28 at ¶ 5) fails for the same reason. *Hanson*, 375 U.S. at 253.

1 NXP's patent infringement claims, and the State of Nevada. Nintendo's motion to dismiss is thus  
 2 meritorious and should be granted—a case dispositive outcome.

3           **B.     Nintendo's Motion To Dismiss Is Capable Of Resolution Without Discovery.**

4           Beyond being merely case dispositive, Nintendo's motion to dismiss can readily be  
 5 decided without additional discovery.

6           **1.     Discovery On Matters Other Than Jurisdiction Is Unwarranted.**

7           There should be no dispute that discovery on matters other than the question of jurisdiction  
 8 is wholly unwarranted, including discovery into matters of infringement contentions under LR  
 9 16.1-6, invalidity contentions under LR 16.1-8, or more general discovery directed toward  
 10 Nintendo component suppliers or other third-parties. Accordingly, and at a minimum, all  
 11 discovery other than jurisdictional discovery should be stayed pending resolution of Nintendo's  
 12 motion to dismiss.

13           **2.     Jurisdictional Discovery Is Unjustified.**

14           Jurisdictional discovery is also wholly unnecessary to resolve Nintendo's motion. As set  
 15 forth in Defendants' Opposition to NXP B.V.'s Motion To Take Jurisdictional Discovery  
 16 ("Opposition"), filed together with this motion, jurisdictional discovery is far from automatic.  
 17 (Opposition at 3-6.) Instead, NXP must make a specific showing that "pertinent facts bearing on  
 18 the question of jurisdiction are controverted" or that "a more satisfactory showing of the facts is  
 19 necessary." *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir.  
 20 1997); *see also Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (the mere "hunch that  
 21 [discovery] might yield jurisdictionally relevant facts" is "insufficient"). Instead of identifying an  
 22 evidentiary basis to controvert any jurisdictional fact, however, NXP's stated reason for seeking  
 23 jurisdictional discovery is that Nintendo's motion to dismiss "relies on four factual declarations."  
 24 (Dkt. No. 37 at 3.) This assertion is neither accurate, nor sufficient to meet the Ninth Circuit's test  
 25 articulated in *Data Disc* and *Boschetto*.

26           NXP's jurisdictional discovery argument is inaccurate in two respects. First, two out of  
 27 the four declarations NXP cites (the declarations of James M. Dowd and Rahul Patel) relate solely

1 to venue analysis under 28 U.S.C. § 1404(a), and the bulk of the remainder is similarly venue  
 2 oriented. Venue declarations cannot justify jurisdictional discovery. Second, Nintendo's motion  
 3 to dismiss rests on *publicly-available* information that NXP could have, and should have,  
 4 uncovered long ago had it engaged in the reasonably diligent pre-suit investigation that it was  
 5 required to conduct. (Dkt No. 34 at 9-11 (explaining that NFC capability has not been available in  
 6 Wii Us in the United States; neither at CES 2012 nor at Las Vegas kiosks).) Had NXP conducted  
 7 the pre-suit investigation the rules require, instead of relying "upon information and belief" for  
 8 every one of its jurisdictional "facts," it could not have alleged that "Nintendo" "prominently  
 9 display[ed] infringing features" at CES events. (Dkt. No. 28, ¶ 5.)

10 More importantly, NXP's jurisdictional discovery argument fails to pass muster under the  
 11 precedent of the Ninth Circuit and the courts of this District. Jurisdiction pled "upon information  
 12 and belief," as NXP pleads here, is "plainly insufficient to allow jurisdictional discovery." *Pfister*  
 13 v. *Selling Source, LLC*, 2013 WL 1150014, at \*5 (D. Nev. Mar. 20, 2013) (citing *Butcher's Union*  
 14 *Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir.  
 15 1986)); *see also Boschetto*, 539 F.3d at 1020 (same); *Terracom v. Valley Nat. Bank*, 49 F.3d 555,  
 16 562 (9th Cir. 1995) ("where a plaintiff's claim of personal jurisdiction appears to be both  
 17 attenuated and based on bare allegations in the face of specific denials made by defendants, the  
 18 Court need not permit even limited discovery" (internal quotations and citations omitted)).  
 19 Instead, to justify jurisdictional discovery, NXP must come forward with evidence that gives its  
 20 jurisdictional allegations a basis in fact. *Boschetto*, 539 F.3d at 1020; *Pfister*, 2013 WL 1150014,  
 21 at \*5; *Grasshopper House, LLC v. Accelerated Recovery Centers, LLC*, 2009 WL 3335874, at \*3  
 22 (D. Or. 2009) ("It is not sufficient for a plaintiff to merely state his belief that discovery will  
 23 enable them to demonstrate minimum contacts for personal jurisdiction." (citing *Butcher's Union*,  
 24 788 F.2d at 540)); *Azco BioTech Inc. v. Qiagen, N.V.*, 2013 WL 4500782, at \* 8 (S.D. Cal. 2013)  
 25 ("The Court will not subject a foreign entity to jurisdictional discovery 'based on little more than a  
 26 hunch that it might yield jurisdictionally relevant facts.'" (quoting *Boschetto*, 539 F.3d at 1020));  
 27 *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 2011 WL 2470671 at \*5 (W.D. Wash. 2011) (same).

1 NXP has not met, and cannot meet, this standard.

2           NXP should not be permitted to plead-first, and ask-questions-later. It was incumbent  
 3 upon NXP to make a good faith investigation *before* suing NCL and NOA in a forum with which  
 4 neither has any connection. Under Rule 11, NXP must conduct a reasonable inquiry that  
 5 establishes factual evidentiary support for the conclusion of personal jurisdiction pled in its First  
 6 Amended Complaint. It is apparent that NXP did not make such an investigation. This conduct  
 7 should not be rewarded by subjecting NCL and NOA to onerous discovery that (in the end) will  
 8 not advance NXP's case.

9           **C.     Nintendo's Interests In Staying The Case Outweigh NXP's Interests In  
 10 Proceeding With The Case And Discovery.**

11           In addition to the two primary factors above, courts sometimes balance the parties'  
 12 competing interests in determining whether to stay discovery. *See, e.g., Puckett v. Schnog*, Case  
 13 No. 2:12-cv-01958-GMN-NJK, 2013 WL 1874754 at \*3 (D. Nev. May 3, 2013) (citing *Landis v.*  
 14 *N. Am. Co.*, 299 U.S. 248, 254-55 (1934)). Those interests can include "the possible damage  
 15 which may result from the granting of a stay, the hardship or inequity which a party may suffer in  
 16 being required to go forward, and the orderly course of justice measured in terms of the  
 17 simplifying or complicating of issues, proof, and questions of law which could be expected to  
 18 result from a stay." *Puckett*, 2013 WL 1874754 at \*3 (quoting *Lockyer v. Mirant Corp.*, 398 F.3d  
 19 1098, 1110 (9th Cir. 2005)). Courts may also consider the directive of Fed. R. Civ. P. 1 to secure  
 20 a "just, speedy, and inexpensive determination of every action and proceeding." *See Ministerio*,  
 21 288 F.R.D. at 504. The balance of interests in this case clearly favors staying discovery.

22           First, the case is at a very early stage. Staying the proceedings pending resolution of  
 23 Nintendo's motion to dismiss stands to avoid the burdens and costs to the Court and parties  
 24 associated with conducting a Rule 26(f) conference, establishing a discovery plan and case  
 25 schedule, preparing detailed patent disclosures required under Local Rule 16.1, and pursuing  
 26 costly and time-consuming discovery efforts. The investments of time and money these activities  
 27 require would be wasted if Nintendo's motion to dismiss is ultimately granted.

28           For its part, NXP has demonstrated no hurry to get on with this case. NXP waited until

1 just days before Nintendo's answer to its Original Complaint was due before filing an Amended  
 2 Complaint, dropping a patent that never should have been asserted in the first place. This action  
 3 reset the clock on Nintendo's responsive pleading. NXP then offered Nintendo an unsolicited 60-  
 4 day extension of time to respond to the Amended Complaint, ostensibly to allow the parties to  
 5 discuss the case. Then, upon receiving Nintendo's motion to dismiss, NXP at first agreed on  
 6 August 26, 2013 to exchange a 30-day extension of its opposition for a stay of all proceedings in  
 7 the case until the motion to dismiss was resolved. Dowd Decl. at ¶¶ 2-3 and Ex. 1. Although  
 8 NXP did a "complete 180" on this agreement the next day (*id.* at ¶ 4), it nonetheless sought and  
 9 obtained a further 46-day extension on its opposition. (Dkt. Nos. 37 and 38.) NXP's consistent  
 10 delay undermines any suggestion of urgency in this case. And to the extent NXP merely hopes by  
 11 its delay to force NCL and NOA to proceed to Rule 26(f), LR 16-1, and LR 16.1 deadlines in a  
 12 forum where they have no "minimum contacts," such tactics both offend traditional notions of fair  
 13 play and substantial justice and unduly prejudice Nintendo. *International Shoe Co. v. Washington*,  
 14 326 U.S. 310, 316 (1945); *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-09  
 15 (1987).

16        *Second*, the stay contemplated by this motion would likely be short. Nintendo's motion to  
 17 dismiss is straightforward and potentially dispositive. When compared to the overall length of  
 18 time it will likely take to bring this five-patent case to trial, a stay pending resolution of this  
 19 motion would have little impact on the ultimate case schedule should Nintendo's motion be  
 20 denied. This minimal impact stands in stark contrast, however, to the potential for substantial  
 21 waste of judicial and party resources if the case proceeds and Nintendo's motion to dismiss is  
 22 ultimately granted.

23        ///

24        ///

25        ///

26        ///

27        ///

1           **IV. CONCLUSION**

2           For the foregoing reasons, Nintendo respectfully requests that the Court stay the discovery  
3           proceedings until such time as the Court rules on Nintendo's pending Motion to Dismiss.

4           Dated: September 6, 2013

5           Respectfully submitted:

6           /s/ W. West Allen

7           W. West Allen (Nevada Bar No. 5566)  
8           wallen@lrrlaw.com  
9           LEWIS ROCA ROTHGERBER LLP  
10          3993 Howard Hughes Parkway, Suite 600  
11          Las Vegas, Nevada 89109  
12          Telephone: (702) 949-8200  
13          Facsimile: (702) 949-8398

14          William F. Lee (*pro hac vice admission pending*)  
15          william.lee@wilmerhale.com

16          Dominic E. Massa (*pro hac vice admission*  
17          *pending*)

18          dominic.massa@wilmerhale.com

19          WILMER CUTLER PICKERING  
20          HALE AND DORR LLP

21          60 State Street

22          Boston, MA 02109

23          Telephone: (617) 526-6000

24          Facsimile: (617) 526-5000

25          James M. Dowd (*pro hac vice admission*  
26          *pending*)

27          james.dowd@wilmerhale.com

28          WILMER CUTLER PICKERING  
29          HALE AND DORR LLP

30          350 South Grand Avenue, Suite 2100

31          Los Angeles, California 90071

32          Telephone: (213) 443-5300

33          Facsimile: (213) 443-5400

34          *Attorneys for Defendants*

35          *Nintendo Co., Ltd., and Nintendo of America Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 6, 2013, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing on the CM/ECF registrants.

s/      Judy Estrada  
An Employee of Lewis Roca Rothgerber LLP